

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

PAUL MICHAEL BREWER,  
Petitioner,

vs.

WARDEN TERESA BITTINGER,  
Respondent.

4:24-CV-04021-RAL

ORDER PURSUANT TO RULE 5  
OF THE RULES GOVERNING  
§ 2254 CASES

Petitioner Paul Michael Brewer filed a habeas petition with this court collaterally attacking his state court conviction pursuant to 28 U.S.C. § 2254. Docket No. 1. Respondent has filed a motion for judgment on the pleadings in this habeas case filed pursuant to 28 U.S.C. § 2254. Docket No. 14. In that motion, respondent argues (among other things) that the state habeas court's decision denying petitioner Paul Michael Brewer's state habeas petition contains factual findings that enjoy reasonable support in the record. See Docket No. 19.

Previously, the court was provided with Mr. Brewer's state court habeas file, Brewer v. Young, 04CIV19-04. This court's review of that state court file indicates that the state habeas court held an evidentiary hearing on

Mr. Brewer's second amended habeas petition on April 1, 2022. No transcript of that hearing is contained in the state court file supplied to this court. Upon inquiry, the state court clerk indicated no transcript of that hearing was ever prepared.

In order to evaluate respondent's motion, part of this court's duty is to review the jury trial transcript from the original criminal file (this court has already done this) and review the transcript of the evidentiary hearing held in Mr. Brewer's state habeas case. This court must then review the state habeas court's findings of fact and determine if the state habeas court's decision "was based on a reasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(2). With no transcript of the state habeas court evidentiary hearing, this court cannot carry out its duty under § 2254(d)(2).

Rule 5 of the Rules Governing § 2254 cases provides that this court may order respondent to prepare a transcription of a previously recorded hearing that has not yet been transcribed. Accordingly, it is hereby

ORDERED that respondent shall immediately make arrangements for the preparation of a transcript of the state court evidentiary hearing held on April 1, 2022, in Mr. Brewer's state habeas case, Brewer v. Young, 04CIV19-04. Respondent shall also file a pleading with the court notifying the court when that transcript will be provided to the court. It shall be provided no later than 30 days from today's date. It is further

ORDERED that if the April 1, 2022, hearing was not recorded, respondent shall file a pleading with the court indicating that fact as well.

DATED this 22nd day of August, 2024.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Veronica L. Duffy", is written over a horizontal line.

VERONICA L. DUFFY

United States Magistrate Judge